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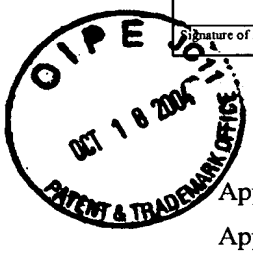

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.	:	09/851,456
Appellant(s)	:	STEPHEN ZIMMERMAN, ET AL.
Filed	:	May 8, 2001
Title	:	SNACK CHIP HAVING IMPROVED DIP CONTAINMENT AND A GRIP REGION
TC/A.U.	:	1761
Examiner	:	D. E. Becker
Conf. No.	:	3630
Docket No.	:	8074M

APPEAL BRIEF

The Honorable Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Appeal Brief is submitted in support of the Notice of Appeal filed on July 8, 2004 and received on July 12, 2004 setting a two-month period for response.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio. The Inventors who are Stephen Paul Zimmerman, Martin Alfred Mishkin, and Benito Albert Romanach assigned their interest to The Procter & Gamble Company which was recorded on January 4, 2002 reel 012442, frame 0180.

RELATED APPEALS AND INTERFERENCES

Appellate briefs for U.S. Patent Application Nos. 09/905,540 (Attorney Docket No. 8169M) and 09/851,894 (Attorney Docket No. 8073M) were filed on June 28, 2004 and on July 20, 2004, respectively, and are related to the appellate brief filed herein.

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01 FC:1251 110.00 DA
02 FC:1402 340.00 DA

STATUS OF CLAIMS

Claims 1-13, 15-18, 22 and 23 are pending and stand rejected. A copy of these claims, which are being appealed, appear in Appendix I herein.

STATUS OF AMENDMENTS

There are currently no outstanding amendments to the claims.

SUMMARY OF THE INVENTION

The present invention includes a uniform snack piece having a dip containment region for containing a dip-condiment. The snack piece includes a body curved about a first axis, wherein the curvature of the body forms a dip containment region having an open end. The first axis is not parallel to a side of the body, whereby the curved body restricts a dip held on the snack piece from flowing off the snack piece in at least two directions. (Appellants' specification, page 4, lines 27-30 to page 5, lines 1-2).

The present invention includes a method of consistently providing the consumer a plurality of snack pieces having a dip containment region. The snack pieces are formed from a plurality of dough pieces. These dough pieces are formed into a uniform size and shape, wherein each of the pieces has a uniform and consistent dip containment region. The dough pieces are constrained on at least the upper or lower side to hold their uniform and consistent size and shape. While being constrained, the dough pieces are cooked to finished snack pieces. (Appellants' specification, page 5, lines 4-10).

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Appellants present the following issue for consideration on appeal:

I. Whether the Examiner's objection to Appellants' information disclosure statement is proper?

II. Whether the Examiner's 35 U.S.C. § 112, first paragraph, rejection of Claim 22 is proper?

III. Whether the Examiner's 35 U.S.C. § 112, second paragraph, rejection of Claim 22 is proper?

IV. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12, 16-17 and 22 as being anticipated over Hreschak (U.S. Design Patent No. 212,070) is proper?

V. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-7, 9, 11-13, 15-18 and 22-23 over Smietana (U.S. Patent No. 4,915,964) is proper?

VI. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12 and 22 over Morales (U.S. Design Patent No. 383,589) is proper?

VII. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12 and 22 over Tirillo (U.S. Patent No. 5,997,921) is proper?

VIII. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claims 10-11 and 15 over Hreschak (U.S. Design Patent No. 212,070) is proper?

IX. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claims 5-7 and 23 over Hreschak (U.S. Design Patent No. 212,070) in view of Blish (U.S. Design Patent No. 166,524) is proper?

X. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claim 18 over Hreschak (U.S. Design Patent No. 212,070) in view of Ipema (U.S. Design Patent No. 300,199) is proper?

XI. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claim 8 over Hreschak (U.S. Design Patent No. 212,070) in view of Bierschenk, et al. (U.S. Patent No. 6,338,606) is proper?

ARGUMENTS

I. Whether the Examiner's objection to Appellant's information disclosure statement is proper?

In the office action, the Examiner states that the information disclosure statement (IDS) fails to comply with the provisions of 37 CFR §§ 1.97, 1.98 and MPEP § 609 because the non-patent literature references do not disclose a date, presumably a 'publication' date.

Appellants respectfully note that although the Examiner has declared Appellant's IDS to be non-compliant, the Examiner has in fact considered all of the non-patent literature references, their alleged deficiencies notwithstanding. This is noted by the Examiner's initialing of each of the non-patent literature references.

Appellant also points out that by considering the references in Appellants' information disclosure statement, the Examiner has in fact duly considered Appellants' IDS. 37 CFR § 1.98(i) clearly states that if an information disclosure statement does not comply, it should be placed in the file but will not be considered by the Office. As demonstrated by the Examiner's due consideration,

the omission of the specific release dates has not materially affected the Examiner's consideration on patentability.

Appellants point out that in U.S. Patent Application No. 09/905,540 the Examiner has used Appellants' submitted samples to reject Appellants' claims in each of the Examiner's office actions dated December 5, 2002, March 21, 2003, October 2, 2003 and January 14, 2004 for the '540 Application. Thus, the Examiner has duly considered Appellants' samples, their lack of publication dates not being deemed by the Examiner to be material to patentability.

Appellant further argues that he has submitted all information known to be material to patentability by the submission of the samples as is. According to 37 CFR § 1.56(a), all information known to be material to patentability must be submitted to the Office. Herein, Appellant has submitted the snack samples in good faith without knowing the respective company-held release dates of the various products. Appellant submitted the snack samples because Appellant knew of their existence prior to Appellant's non-provisional patent application filing date. In good faith, Appellant submitted the snack samples as an admission that their existence pre-dated Appellant's non-provisional filing date. By such submission, Appellant asserts that he has satisfied the requirements of 37 CFR § 1.56(a), 1.97, 1.98 and MPEP § 609.

Appellants also note that neither Appellants, Appellants' Attorney or Appellants' Assignee have been able to provide the "publication" dates of the non-patent references because each of the references is a sample of competitive product having its origin outside of the control of, in particular, Appellants' Assignee, namely, Procter & Gamble. Further, neither Appellants, Appellants' Attorney or Appellants' Assignee are privy to the internal release dates of competitive product. Those release dates are solely within the control of the respective companies' marketing the products. Appellants therefore contend that not having the specific release dates does not make their IDS deficient nor does it materially impact patentability or the Examiner's determination thereof.

In the Examiner's latest office action dated April 30, 2004, the Examiner now indicates that "simply...providing the dates on which these samples were obtained would meet the requirement" of 37 C.F.R. §§ 1.97, 1.98 and MPEP § 609. Applicants point out, however, that the Examiner has duly considered the relevance of each of the samples as if each had a date before Appellants' original non-provisional filing; i.e., prior to May 8, 2001. As such, given this due consideration, Appellants consider that the requirements for their IDS have been satisfied and that the Examiner's objection should be removed.

Therefore, Because Appellants' IDS has been duly considered by the Examiner in direct contravention of 37 CFR § 1.98(i) and because Appellants have met their responsibilities under the above-noted rules, Appellants respectfully request reconsideration of their IDS as is and the removal of the Examiner's objection thereto.

II. Whether the Examiner's 35 U.S.C. § 112, first paragraph, rejection of Claim 22 is proper?

Claim 22 stands rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter that was not described in the specification in such a way as to enable one of skill in the art to make or use the invention. Specifically, the Examiner asserts that the term "engagement span" is not described by the specification, nor does the specification teach how to calculate the engagement span.

Appellants respectfully disagree with the Examiner. Appellants contend that the engagement span is described both in the specification and in the figures of the specification. For example, Appellants describe the engagement span in the disclosure itself.[1] Therein, the engagement span is described as calculable from certain percentages of the vertex span that is useful to help obtain the optimal orientation of the axis of curvature of the chip.[2] The vertex span is also properly defined and disclosed in the specification.[3]

Furthermore, the location and orientation of the engagement span are shown in Figures 3a, 3b, 3c, and 3d of Appellants' specification. In each figure, the engagement span is shown as being geometrically similar to the vertex span. Also, Appellants respectfully assert that 90% of any calculated number (i.e., the vertex span) is readily calculable, and one of skill in the art would know how to calculate 90% of that number; namely, through multiplication of 0.90 times the vertex span. Thus, the engagement span is in fact described and defined and its calculation is readily ascertainable by one of skill in the art; i.e., "the engagement span is 90% of the vertex span..."[4]

In addition, the Examiner seems to be contradictory in his statements regarding the engagement span. First, the Examiner states (for the purposes of the 35 U.S.C. § 112, first paragraph, rejection) that "the specification does not describe what an engagement span is, or how it is calculated."[5] Also, the Examiner asserts "it is not clear how it [the engagement span] was calculated."[6] However, later in the office action, the Examiner ascribes the existence of Appellants' engagement span to several of the references cited against Appellants' claims, e.g., Hreschak (U.S. Design Patent No. 212,070), Smietana (U.S. Patent No. 4,915,964), Morales (U.S. Design Patent No. 383,589), and Tirillo (U.S. Patent No. 5,997,921). As an example the Examiner states the following:

> Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides

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[1] Appellants' Specification at page 9, lines 16-23.
[2] Id. at page 9, lines 21-24; (i.e., "The engagement span is about 90% of the vertex span, more preferably about 70%, most preferably about 50%...")
[3] Id. at page 9, lines 18-23.
[4] Id. at page 9, lines 21-24
[5] Examiner's Office Action, dated October 21, 2003, page 2.
[6] Id.

> which are not parallel to the axis, restriction of movement to the sides and rear, [and] an engagement span which is 90% of the vertical span[.][7] [Emphasis added.]

Appellants respectfully assert that it is improper for the Examiner to disavow the efficacy of Appellants' description of their engagement span for one type of rejection (i.e., 35 U.S.C. § 112) and then in the next breath use Appellants' description of their engagement span (just like Appellants have asserted that one of skill in the art would use it) to reject Appellants' claims in another type of rejection (i.e., 35 U.S.C. § 102(b), (e) and 35 U.S.C. § 103(a)).

Appellants respectfully assert that the Examiner cannot have it both ways. He cannot in one instance assert that Appellants' engagement span is improperly described, incalculable and therefore unknowable and then in the next instance calculate Appellants' engagement span upon the prior art and use his calculations to reject Appellants' claims. To do such is improper and inconsistent by the Examiner.

Appellants therefore respectfully request reconsideration and allowance of Claim 22 over the Examiner's 35 U.S.C. § 112, first paragraph, rejection.

III. Whether the Examiner's 35 U.S.C. § 112, second paragraph, rejection of Claim 22 is proper?

Claim 22 stands rejected under 35 U.S.C. § 112, second paragraph. The Examiner again asserts that it is not clear what an engagement span is or how it is calculated.

For all of the reasons cited above for the 35 U.S.C. § 112, first paragraph, rejection, Appellants respectfully assert that the Examiner's rejection is improper. Therefore, Appellants request reconsideration and allowance of Claim 22 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

IV. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12, 16-17 and 22 as being anticipated over Hreschak (U.S. Design Patent No. 212,070) is proper?

Claims 1-4, 9, 12, 16-17 and 22 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Hreschak (U.S. Design Patent No. 212,070--Hreschak '070).

The Examiner states that Hreschak '070 teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides that are not parallel to the axis, restriction of movement to the sides and rear, an engagement span that is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end that is less than 75% of

[7] Id. at page 4.

the open width, a vertical taper of less than 45°, and a varying radius of curvature along its length (see Figures 1-4).

The Examiner further states that the recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. He further states that a preamble is generally not accorded patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness, but instead steps or structural limitations are able to stand alone. The Examiner concludes by stating "regardless, nearly any snack product, including Hreschak ['070] would be capable of being stacked in some manner, for instance in a pile." The Examiner cites In re Hirao (535 F.2d 67, 190 USPQ 15 (CCPA 1976)) and Kropa v. Robie (187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951)).

According to MPEP § 2131 a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The identical invention must be shown in as complete detail as is contained in the claim. The elements must be arranged as required by the claim.

Argument for Claim 1

Appellants assert that the Examiner has improperly not considered Appellants' preamble and also has misapplied legal precedent as a basis for that lack of consideration. A claim preamble has the import that the claim as a whole suggests for it.[8] If the claim preamble, when read in the context of the entire claim, recites limitations of the claim, or, if the claim preamble is necessary to give life, meaning, and vitality to the claim, then the claim preamble should be constructed as if in the balance of the claim.[9] And further, any terminology in the preamble that limits the structure of the claimed invention must be treated as a claim limitation.[10]

Herein, the term "stackable", which was previously added to the preamble of Claim 1 is a term that should have been considered by the Examiner because it further limits the scope of Claim 1. Appellants assert that the "stackable" limitation is necessary to give life, meaning and vitality to the claim and in particular further describes the snack piece; i.e., exactly the type and kind of snack piece--"a stackable, uniform snack piece." The inclusion of the term "stackable" is well-supported throughout the specification and should be fully considered as part of Claim 1 and a limitation to Claim 1.

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[8] Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, 620, 34 USPQ2d 1816, 1820 (Fed. Cir. 1995).
[9] Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1305, 51 USPQ2d 1161, 1165-66 (Fed. Cir. 1999).
[10] Corning Glass Works v. Sumitomo Elec. U.S.A., Inc., 868 F.2d 1251, 1257, 9 USPQ2d 1962, 1966 (Fed. Cir. 1989).

Regarding Hreschak '070, the snack pieces thereof are not stackable or meant to be stacked. The folded finger portion 34 that resides at the end of Hreschak's food product would render stacking of his product impossible, because the folded finger portion 34 could not in fact be stacked one on top of another.[11] In contrast, Appellants' entire snack piece can be stacked and into a container designed for such an arrangement.[12] The Examiner attempts to avoid this distinction by asserting that Hreschak '070 might be "stacked into a pile". However, Appellants respectfully assert that a pile is not a stacking as shown and taught by Appellants' specification, nor is a pile of un-stackable snack pieces (e.g., Hreschak '070) Appellants' stack of snack pieces as known to one of skill in the art.

To wit, Appellants' stackable feature is not taught or shown by Hreschak '070; nor is it inherently derived from Hreschak's figures or disclosure. Also, the Examiner does not point to any teaching within Hreschak '070 that shows that the snack pieces of Hreschak '070 can be stacked. Hreschak '070 certainly does not teach Appellants' stacking or any other stacking or any other stacking of their snack product. As such, it is a missing element that cannot be properly included in a rejection against Appellants' claims based upon anticipation. Furthermore, Appellants assert that if the Examiner knows of a manner in which the snack pieces of Hreschak '070 may be stacked, it is wholly within the Examiner's personal knowledge and is therefore improper since such knowledge is not within Hrsechak '070.

In addition, Appellants expressly do not concede that Hreschak '070 teaches Appellants' engagement span. In one instance in the Examiner's office action dated October 21, 2003, he states that Appellants' engagement span is incalculable and that it is not clear as to what it is. In the next instance, however, he seemingly calculates Appellants' engagement span and then applies such to Hreschak '070. Furthermore, the Examiner applies Appellants' engagement span to Hreschak '070 without indicating how such was calculated. Appellants therefore believe that in the Examiner's application of their engagement span to Hreschak '070, the Examiner has used knowledge available to one of skill in the art and Appellants' specification to calculate for Hreschak's so-called engagement span.

Appellants therefore respectfully request reconsideration and allowance of Claims 1-4, 9, 12, 16-17 and 22 over the Examiner's 35 U.S.C. § 102(b) rejection.

V. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-7, 9, 11-13, 15-18 and 22-23 over Smietana (U.S. Patent No. 4,915,964) is proper?

Claims 1-7, 9, 11-13, 15-18 and 22-23 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Smietana (U.S. Patent No. 4,915,964).

[11] U.S. Design Patent No. 212,070 (Hreschak) at Figure 5.
[12] Appellants' Specification at page 16, lines 19-24; and Figures 12, 14 and 15.

The Examiner states that Smietana '964 restricts dip in at least two directions and that the reference provides an engagement span less than 90% of the vertical span.

Appellants respectfully disagree with the Examiner's assertions. First, Figure 1 of Smietana '964 shows a possible restriction of dip in only one direction, namely, at the narrow conical end. Else, there is no second restrictive end, and the Examiner has not described or pointed to such. In fact, according the figures of Smietana '964, only two ends exist--the narrow conical end and the opposing open end. Smietana does not teach a dip restriction in at least two directions. This element is therefore missing.

Furthermore, Appellants expressly do not concede that Smietana '964 teaches Appellants' engagement span. In one instance in the Examiner's office action dated January 21, 2004, he states that Appellants' engagement span is incalculable and that it is not clear as to what it is. In the next instance, however, he seemingly calculates Appellants' engagement span and then applies such to Smietana '964. Furthermore, the Examiner applies Appellants' engagement span to Smietana '964 without indicating how such was calculated. Appellants therefore believe that in the Examiner's application of their engagement span to Smietana '964, the Examiner has used exactly what Appellants' have stated one should use; i.e., 1) the knowledge available to one of skill in the art (e.g., simple decimal/percentage calculations) and 2) Appellants' specification as a guide to make the necessary calculations.

Appellants respectfully assert that it is improper for the Examiner to state on the one hand that Appellants' engagement span is incalculable and unclear and then in a subsequent rejection calculate and the use Appellants' engagement span against Appellants' claims. The Examiner's dual positions run counter to each other are therefore improperly applied.

Appellants therefore respectfully request reconsideration and allowance of Claims 1-7, 9, 11-13, 15-18 and 22-23 over the Examiner's 35 U.S.C. § 102(b) rejection.

VI. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12 and 22 over Morales (U.S. Design Patent No. 383,589) is proper?

Claims 1-4, 9, 12 and 22 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Morales (U.S. Design Patent No. 383,589).

The Examiner asserts that Morales teaches a stackable snack piece having a restricted end and an engagement span less than 90% the vertical span.

Appellants respectfully assert that Morales '589 does not show their snack piece being stacked. In fact, nothing in Morales '589 provides a showing or teaching of stacking. Also, Appellants consider that the Examiner's assertion that Morales '589 provides an engagement span is

also within the 1) knowledge available to one of skill in the art (e.g., simple decimal/percentage calculations) and 2) Appellants' specification.

Appellants respectfully assert that it is improper for the Examiner to state on the one hand that Appellants' engagement span is incalculable and unclear and then in a subsequent rejection calculate and the use Appellants' engagement span against Appellants' claims. The Examiner's dual positions run counter to each other are therefore improperly applied.

Appellants therefore request reconsideration and allowance of Claims 1-4, 9, 12 and 22 over the Examiner's 35 U.S.C. § 102(b) rejection.

VII. Whether the Examiner's 35 U.S.C. § 102(b) rejection of Claims 1-4, 9, 12 and 22 over Tirillo (U.S. Patent No. 5,997,921) is proper?

The Examiner asserts that Tirillo '921 teaches a stackable snack piece comprising an engagement span less than 90%. Appellants expressly disclaim these assertions. Nothing in Tirillo '921 teaches or shows stacking of their taco shell. Also, Tirillo '921 does not teach or show an engagement span of any sort and certainly not one less than 90%. Appellants believe that these two assertions are incorrect and not supported by any teaching of Tirillo '921.

Appellants respectfully assert that it is improper for the Examiner to state on the one hand that Appellants' engagement span is incalculable and unclear and then in a subsequent rejection calculate and the use Appellants' engagement span against Appellants' claims. The Examiner's dual positions run counter to each other are therefore improperly applied.

Appellants therefore request reconsideration and allowance of Claims 1-4, 9, 12 and 22 over the Examiner's 35 U.S.C. § 102(b) rejection.

VIII. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claims 10-11 and 15 over Hreschak (U.S. Design Patent No. 212,070) is proper?

Claims 10-11 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070. The Examiner notes that Hreschak '070 does not teach a length of 30 - 110 mm, a radius of curvature of 15 - 500 mm, or an open width of 15 - 75 mm.

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations. (MPEP § 2142).

Appellants point out that not only does Hreschak '070 not teach Appellant's radius of curvature ranges, but also, Appellants contend that Hreschak '070 does not teach or suggest

Appellant's snack piece having a body curved about a first axis, the curvature of the body forming a dip containment region. In fact, the snack piece of Hreschak '070 shows merely a flattened main surface with a pinched, elevated portion at one end of the snack piece and no dip containment region within a curved region of the snack.[13]

Appellants therefore respectfully assert that Hreschak '070 teaches away from Appellants' snack piece since a flattened snack piece without a dip containment region within a curved region of the snack operates counter to Appellants' curved dip containment region, and one of skill in the art looking at Hreschak '070 would not be motivated to produce Appellants' curved chip from Hreschak's flattened chip.

Also, Appellants point that Claims 10, 11 and 15 depend upon Claim 1. Claim 1 recites a stackable snack piece of which Hreschak '070 is not. In fact, Appellants contend that due to Hreschak's pinched end, it would be impossible to stack the snack pieces thereof. In addition, since the Examiner asserts that Hreschak '070 is stackable, and Hreschak '070 does not itself teach that element, Appellants believe that the Examiner's assertion of stackability derives wholly from knowledge available to one of skill in the art (e.g., simple decimal/percentage calculations) and 2) Appellants' specification.

Thus, Appellants respectfully request reconsideration and allowance of Claims 10-11 and 15 over the Examiner's 35 U.S.C. § 103(a) rejection.

IX. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claims 5-7 and 23 over Hreschak (U.S. Design Patent No. 212,070) in view of Blish (U.S. Design Patent No. 166,524) is proper?

Appellants believe that the combination of Hreschak '070 in view of Blish '524 is improper. As noted herein previously, Appellants respectfully contend that the design of Hreschak '070 teaches away from Appellants' stackable snack piece because it would be physically impossible to stack the combined snack piece of Hreschak/Blish due to one end being pinched and elevated above the surface of the snack piece, i.e., the pinched end of Hreschak '070 defeats stackability and one of skill in the art looking at Hreschak '070 would be motivated against making a stacked snack piece like Appellants.

Hence, Appellants respectfully request reconsideration and allowance of Claims 5-7 and 23 over the Examiner's 35 U.S.C. § 103(a) rejection.

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[13] U.S. Design Patent No. 212,070 (Hreschak), Figure 4.

X. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claim 18 over Hreschak (U.S. Design Patent No. 212,070) in view of Ipema (U.S. Design Patent No. 300,199) is proper?

Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of Ipema [Des. 300,199].

As noted herein previously, Appellants respectfully contend that the design of Hreschak '070 teaches away from Appellants' snack piece for all of the reasons noted hereinbefore. Such teaching away is not cured by the combination of Hreschak '070 with Ipema '199, because Hreschak's teaching away from Appellants' invention removes it as a viable reference in any obviousness rejection, singly or in combination with any other reference.

Appellants therefore request reconsideration and allowance of Claim 18 over the Examiner's 35 U.S.C. § 103(a) rejection.

XI. Whether the Examiner's 35 U.S.C. § 103(a) rejection of Claim 8 over Hreschak (U.S. Design Patent No. 212,070) in view of Bierschenk, et al. (U.S. Patent No. 6,338,606) is proper?

Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of Biershenk '606.

As noted herein previously, Appellants respectfully contend that the design of Hreschak '070 teaches away from Appellants' snack piece for all of the reasons noted hereinbefore. Such teaching away is not cured by the combination of Hreschak '070 with Biershenk '606, because Hreschak's teaching away from Appellants' invention removes it as a viable reference in any obviousness rejection, singly or in combination with any other reference.

Appellants therefore request reconsideration and allowance of Claim 8 over the Examiner's 35 U.S.C. § 103 rejection.

SUMMARY

FOR: STEPHEN ZIMMERMAN, ET AL.

By_____
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October 11, 2004
Customer No. 27752

APPENDIX I

Appealed Claims: Application No. 8074M

Claim 1 (Previously Presented) A stackable, uniform snack piece having a dip containment region for containing a dip-condiment, said snack piece comprising:

a) a body curved about a first axis, said curvature of said body forming a dip containment region having an open end and a restricted end and wherein said first axis is not parallel to a side of said body, whereby said curved body restricts a dip held on said snack piece from flowing out of the dip containment region of said snack piece in at least two directions.

Claim 2 (Previously Presented) A snack piece according to claim 1, wherein said snack piece further comprises a vertical span.

Claim 3 (Original) A snack piece according to claim 1, wherein said curved body of said snack piece forms substantially two side walls adjacent to said containment region at said open end, whereby preventing the dip from flowing over said side walls at said open end and off of said snack piece.

Claim 4 (Original) A snack piece according to claim 1, wherein said first axis is perpendicular to said open end.

Claim 5 (Original) A snack piece according to claim 1, wherein said snack piece is triangular-shaped.

Claim 6 (Original) A snack piece according to claim 5, wherein said snack piece is isosceles shaped.

Claim 7 (Previously Presented) A snack piece according to claim 6, wherein said axis is perpendicular to at least one said side of said isosceles triangle.

Claim 8 (Previously Presented) A snack piece according to claim 5, wherein said snack piece is an equilateral triangle.

Claim 9 (Previously Presented) A snack piece according to claim 1, wherein said snack piece when held in a tilted position greater than 0°, said restricted end restricts flow through said restricted end and out of the dip containment region of said snack piece.

Claim 10 (Previously Presented) A snack piece according to claim 1, wherein said snack piece has a length (L) from about 30 mm to about 110 mm.

Claim 11 (Original) A snack piece according to claim 1, wherein said snack piece has a radius of curvature used to form said snack piece from about 15 mm to about 500 mm.

Claim 12 (Previously Presented) A snack piece according to claim 1, wherein said snack piece has a vertical taper between about 0° to about 45°.

Claim 13 (Original) A snack piece according to claim 1, wherein said snack piece is placed in a nested arrangement with a plurality of said snack piece.

Claim 14 (Canceled).

Claim 15 (Original) A snack piece according to claim 1, wherein said open end has a width from about 15 mm to about 75 mm.

Claim 16 (Original) A snack piece according to claim 1, wherein said restricted end is less than about 75% of the width of said open end.

Claim 17 (Original) A snack piece according to claim 1, wherein said curvature of said snack piece has a varying radius of curvature along the length of said snack piece.

Claim 18 (Original) A snack piece according to claim 1, wherein said snack piece is a segment of a right cone.

Claims 19-21 (Canceled.)

Claim 22 (Previously Presented) A snack piece according to claim 2 wherein the snack piece comprises an engagement span measurable at no more than about 90% of the vertical span.

Claim 23 (Previously Presented) A snack piece according to claim 7 wherein said side of said isosceles triangle that is perpendicular to said axis is a base of said isosceles triangle.

Claims 24-26 (Canceled.)

PTO/SB/17 (10/04)
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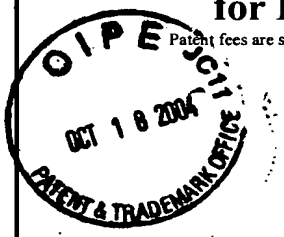
FEE TRANSMITTAL for FY 2005

Patent fees are subject to annual revision.



TOTAL AMOUNT OF PAYMENT ($) 450.00

Complete if Known	
Application Number	09/851,456
Confirmation Number	3630
Filing Date	May 8, 2001
First Named Inventor	Stephen Zimmerman, et al.
Examiner Name	D. E. Becker
Art Unit	1761
Attorney Docket No.	8074M

METHOD OF PAYMENT

1. [X] The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to:

Deposit Account Number: **16-2480**
Deposit Account Name: **The Procter & Gamble Company**

FEE CALCULATION

1. **BASIC FILING FEE – Large Entity**

Code	($)	Fee Description	Fee Paid
1001	790	Utility filing fee	[]
1002	350	Design filing fee	[]
1004	790	Reissue filing fee	[]
1005	160	Provisional filing fee	[]

SUBTOTAL (1) ($)[0]

2. **EXTRA CLAIM FEES FOR UTILITY AND REISSUE – Large Entity**

		Extra Claims	Fee from Below	Fee Paid
Total Claims	[] - 20** =	[] x	[]	=[]
Independent Claims	[] - 3** =	[] x	[]	=[]
Multiple Dependent			[]	=[]

** or number previously paid, if greater; For Reissues, see below

Code	($)	Fee Description
1202	18	Claims in excess of 20
1201	88	Independent claims in excess of 3
1203	300	Multiple dependent claim, if not paid
1204	88	**Reissue independent claims over original patent
1205	18	**Reissue claims in excess of 20 & over original patent

SUBTOTAL (2) ($)[0]

FEE CALCULATION (continued)

3. **ADDITIONAL FEES**

Code	($)	Fee Description	Fee Paid
1051	130	Surcharge-late filing fee or oath	[]
1052	50	Surcharge-late provisional filing fee or cover sheet	[]
1053	130	Non-English specification	[]
1812	2,520	For filing a request for *ex parte* reexamination	[]
1804	920*	Requesting publication of SIR prior to Examiner's action	[]
1805	1,840*	Requesting publication of SIR after Examiner's action	[]
1251	110	Extension for reply within 1st month	[X]
1252	430	Extension for reply within 2nd month	[]
1253	980	Extension for reply within 3rd month	[]
1254	1,530	Extension for reply within 4th month	[]
1255	2,080	Extension for reply within 5th month	[]
1401	340	Notice of Appeal	[]
1402	340	Filing a brief in support of an appeal	[X]
1403	300	Request for oral hearing	[]
1451	1,510	Petition to institute a public use proceeding	[]
1452	110	Petition to revive - unavoidable	[]
1453	1,370	Petition to revive - unintentional	[]
1501	1,370	Utility issue fee (or reissue)	[]
1502	490	Design issue fee	[]
1460	130	Petitions to the Commissioner	[]
1807	50	Processing fee under 37 C.F.R. 1.17(q)	[]
1806	180	Submission of Information Disclosure Statement	[]
1809	790	Filing a submission after final rejection (37 CFR § 1.129(a))	[]
1810	790	For each additional invention to be examined (37 CFR §1.129(b)	[]
1801	790	Request for Continued Examination (RCE)	[]
1802	900	Request for expedited examination of a design application	[]
1454	1370	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	[]

Other fee (specify) _____ []
Other fee (specify) _____ []

* Reduced by Basic Filing Fee Paid SUBTOTAL(3) ($) [450]

SUBMITTED BY				Complete (if applicable)	
Name (Print/Type)	T. P. Cummings	Registration No. (Attorney/Agent)	40,973	Telephone	(513) 634-1906
Signature				Date	10/11/2004

This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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